BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN D. JENKINS, JR. Claimant v. **DEFFENBAUGH INDUSTRIES, INC.** Respondent and **FARMINGTON CASUALTY COMPANY** Insurance Carrier	)	Docket No. 1,072,350

ORDER

Respondent and insurance carrier (respondent) requests review of the August 4, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Claimant appears by counsel, John M. Ostrowski. Respondent appears by counsel, Mark J. Hoffmeister.

ISSUE

The ALJ found claimant sustained an accidental injury arising out of and in the course of his employment with respondent and respondent failed to prove claimant recklessly violated workplace safety rules or willfully failed to use reasonable, proper guard and protection. The ALJ granted claimant's request for compensation for out-of-pocket medical expenses and medical treatment.

Respondent contends the ALJ erred, exceeded his jurisdiction and misinterpreted the law by finding respondent failed to prove claimant's injuries were the result of his reckless violation of safety rules. Respondent argues claimant failed to use a reasonable and proper guard by disabling the alarm system and failing to lower the safety rails. Respondent also argues claimant knew respondent's safety rules, but traveled well above the speed limit and was not wearing a seat belt at the time of the accident.

Claimant argues he did not act in conscious disregard of a known risk and requests the Board affirm the ALJ's decision.

The sole issue on appeal is: was claimant's accident and injuries the result of reckless violations of safety rules or willful failure to use reasonable, proper guard and protection?

FINDINGS OF FACT

Claimant began working for respondent on October 18, 2011, as a Class A CDL driver, delivering trash. Claimant worked the night shift driving a commercial roll-off dumpster truck which hauled industrial-sized trash containers. Claimant's shift was from 5 p.m. to 5 a.m., but sometimes he would work a 14 hour day. Each day, claimant was provided keys to a truck and a radio, and he performed a vehicle inspection. Claimant received a route with a list of locations where he picked up full containers of trash. Claimant made six to nine pick-ups in an evening and always drove the same route.

To pick up each trash container, claimant backed the truck to the container, raised the rails and got out of the vehicle to hook up a cable. Claimant then hoisted the container onto the truck using the rails, tarped it, if needed, and threw safety chains on the container from the back of the vehicle. Claimant proceeded to the dump site where he raised the rails and pulled forward allowing the trash to slide out. Claimant then returned the container to the customer where he picked it up.

To lower the rails, claimant used a joystick. It is not difficult to lower the rails and it takes 90 seconds or less. When the rails are raised, an alarm sounds. The alarm does not quit sounding until the rails are completely lowered. Per respondent's safety rules, when driving, the rails are completely lowered.

On the evening of November 20, 2014, claimant began his shift. Claimant performed his safety inspection on the truck and did not find any defects. He tested the alarm system during the safety inspection and it was working. Claimant averred he did not tamper with or disturb the alarm. If claimant found something wrong with the truck, he would write it up, take it to the maintenance shop and get a different truck.

On November 21, after working more than seven hours, at around 2:30 a.m. claimant struck a bridge with the truck rails up. Claimant had just delivered a container for Goodwill Industries and did not have a container on the truck at the time of the accident. Claimant previously drove this route and knew the bridge was there. Approximately 150 to 200 feet before the bridge, claimant stopped at a red stoplight. After waiting for the stoplight to turn green, claimant proceeded. The next thing he knew, he was injured.

Claimant thought the speed limit was 35 miles per hour, but acknowledged there was a yellow sign on the way to the bridge showing a suggested speed of 20 miles per hour. A photograph with the concrete bridge claimant struck in the background, depicts two yellow signs with, one sign with an S-curve and below it another sign that reads 20 M.P.H.[1]

[1] P.H. Trans. (July 29, 2015), Resp. Ex. H at 1.

Claimant testified that when he stopped at the stoplight and hit the bridge, he was on a personal telephone call with Danny Greg, a coworker, using a hands-free device. It was not a violation of safety rules to have such a personal telephone call. The alarm for the rails, when sounding, is loud and would make it difficult to carry on a telephone conversation. Claimant testified he wore his seatbelt at the time of the accident.

Before the accident, claimant made four or five stops and when he dropped off the container at Goodwill, the alarm and light showing the rails are up were working. If the alarm was not working, claimant would have stopped his route and taken the truck to be repaired. Claimant did not hear an alarm nor see the flashing alarm light after leaving Goodwill. The alarm was not going off when claimant hit the bridge and claimant testified he did not disable the alarm. Claimant testified he would not have driven had he heard an alarm or saw a flashing light indicating the rails were up. Claimant believed he had lowered the rails. He knew of no reason why he failed to lower the rails and did not intentionally drive with the rails up. Claimant has seen joy sticks jam before and he has seen rails rise on their own.

The alarm is in a box fed by a cord which is screwed on, like a cable television cord. Claimant has never seen a cord come off, but the truck is a commercial vehicle that rattles all day and things come loose in the truck all of the time. Claimant did not know how the cable could have been disconnected, and he would not and did not intentionally disable the alarm system. Claimant had no reason to intentionally drive with the rails up.

After the accident, claimant called his supervisor three times before he reached him. Claimant told him he hit the bridge and was seriously injured. Around 45 minutes after the accident, emergency vehicles finally arrived. Claimant was hospitalized for seven days with broken ribs, internal bleeding, an injured spleen and an injured colon. Claimant had one surgery to repair his injuries. A further discussion of claimant's injuries and medical treatment is not warranted because they are not germane to the issue on appeal.

When he was hired, claimant underwent training and orientation where company safety rules were reviewed. Claimant confirmed that wearing safety belts while driving, obeying the speed limits, driving with the rails down and not disabling safety alarms were company rules he needed to follow. Occasionally, respondent's drivers had "safety huddles" to review documents with safety procedures. Safety huddle topics included checking for anything wrong with the truck, watching safety violations, not speeding, and wearing your seat belt.

Claimant testified once per month his supervisor randomly followed him without his knowledge to evaluate his performance. If his supervisor witnessed an infraction, he would approach claimant's truck, ask for his drivers' license and DOT card, and ask him to sign a paper stating the infractions.

Claimant testified that in October 2013, he was disciplined for running a stop sign on a deserted street. Around 30 days before the accident, claimant was written up and suspended for a week for driving irresponsibly, dangerously and violating a number of traffic rules and company rules. For proof, claimant's supervisor showed him a video of the back of one of respondent's trucks with no way of knowing if he was driving the truck. When claimant received the disciplinary actions, he signed the papers and did not argue or deny them.

John Cheek was employed as respondent's director of risk management and oversaw the liability claims department, safety, training and recruiting until the company was sold and his job was downsized. He receives severance pay from respondent. Mr. Cheek took safety training classes from OSHA and DOT, and a number of accident investigation classes.

Prior to working for respondent, Mr. Cheek was a police officer in Kansas City, Kansas, for almost 12 years. In his first five years as a police officer, Mr. Cheek was an accident investigator. He received 40 hours of accident investigation training in the police academy, 80 hours advanced accident training, two classes at the Missouri Department of Transportation, and advanced accident training at the North American Transportation Management Institute. Working as a police officer and with respondent, Mr. Cheek estimates he has investigated several hundred accidents. Mr. Cheek was involuntarily terminated from the police department because of his felony criminal record.

Mr. Cheek went to the accident scene and took photographs of damage to the rails and the truck. When Mr. Cheek arrived, the truck was in its "final resting place" after striking the bridge. According to Mr. Cheek's testimony, the 45,000 pound truck catapulted backwards 50 yards after striking the bridge. The rails were bent backwards, almost in two, and the rail cylinders were destroyed. The accident broke the axles and the bellhousing that holds the transmission.

In the 14 years Mr. Cheek worked for respondent, he investigated two previous accidents caused because the rails were up. In one of those accidents, Mr. Cheek observed the truck after it struck a bridge. That truck was not knocked backwards and the cylinders on the rails were bent, but not the rails themselves. The driver of that truck stated he was driving 45 miles per hour.

Mr. Cheek opined claimant was traveling in excess of 45 miles per hour when he struck the bridge. Mr. Cheek did not mathematically calculate the speed of claimant's truck, but instead made an eyeball assessment. Mr. Cheek testified it was not possible claimant stopped at the stop light before the bridge, given the amount of damage the truck sustained.

Mr. Cheek testified, that without question, claimant was not wearing his seat belt, because the steering wheel was bent in multiple locations. The steering wheel was also

scuffed and scraped from clothing. According to Mr. Cheek, if claimant had his seat belt on, the shoulder harness would have stopped him immediately and kept him from striking the steering wheel.

Two photographs of rail alarm systems were introduced at the preliminary hearing.[2] One photograph depicts a connected alarm system and the other showed the disconnected alarm system in claimant's wrecked truck. Mr. Cheek, on cross-examination, provided the following testimony concerning whether claimant disabled the alarm system on his truck:

> Q. I'm asking you if it's your allegation that No. 7 shows a deliberate act of disconnecting the alarm?
>
> A. Well there's no way to tell that. I would be speculating if I said that. What I'm saying is - -
>
> Q. Part of your reason for firing Mr. Jenkins was because you say he disabled the alarm.
>
> A. He disabled it.
>
> Q. But you just testified that there's no way to tell if it was an intentional act.
>
> A. Well, lets just say this: If that alarm was working, he would have been in a serious violation to operate that truck without downing it.[3]

Mr. Cheek testified it is easy to put the rails down and only takes five or ten seconds. The alarm is designed to be irritating so the driver has to lower the rails before he leaves the customer's property. To disable the alarm risks the driver's personal health and safety and others. Mr. Cheek believes claimant disabled the alarm because it was a safety device that annoyed him.

Mr. Cheek testified as a police officer, his understanding of the yellow cautionary sign is that it is a 20 miles per hour speed limit sign and to use caution through the curve. According to Mr. Cheek, it was against respondent's policy to exceed the 20 miles per hour speed sign.

Eric T. Dodson has been respondent's fleet technical trainer for 11 years. Mr. Dodson is a certified mechanic, and he trains and supervises respondent's mechanics. Mr. Dodson examined claimant's truck after the accident at respondent's shop in Kansas

---

[2] P.H. Trans. (July 29, 2015), Resp. Ex. G at 6-7.

[3] P.H. Trans. (July 29, 2015) at 68.

City, Kansas. Mr. Dodson saw the truck at 4:30 a.m. after the tow company dropped off the truck at 4 a.m.

Mr. Dodson indicated the truck had significant rail damage and both rear axles were bent. The rails are made of 6- by 4-inch tubular steel reinforced with half-inch rail iron welded to the top. It would take quite a bit of force to break the rails as they were when Mr. Dodson saw them. Mr. Dodson saw two other trucks that had run into a bridge or embankment, but the extent of damage on them was less severe. Mr. Dodson testified the seat belt was functioning properly.

Mr. Dodson testified drivers must physically put the rails up or down, they cannot go up spontaneously on their own. He noticed the proximity sensor for the rails alarm on claimant's truck was disconnected. Mr. Dodson testified the alarm system includes a light and if the alarm is disconnected, the light is off. Mr. Dodson testified respondent's mechanics inspect the alarms every month to make sure they are connected tightly. If the connecter is loose it pops off, but if threaded on, it would not. If the connector is coming off, it is the duty of the driver to report it to the mechanics. Mr. Dodson never saw a connecter jiggle loose without being disconnected by someone. When claimant's truck came into the shop, Mr. Dodson reconnected the alarm and it functioned properly.

Mr. Dodson testified respondent began installing the alarm systems six years ago. There are a certain series of new trucks that will not drive faster than five miles per hour if the rails are up. Mr. Dodson testified the new trucks are an improvement and safer than over the old alarm system. The new trucks have the same type of sensor that can be unplugged.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501(a) states:

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
>
> (A) The employee's deliberate intention to cause such injury;
>
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

Recklessness is a lesser standard of conduct than intentional conduct and requires running a risk substantially greater than the risk which makes the conduct merely negligent or careless.[4]

While "the term recklessness is not self-defining," the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[5]

In *Wiehe*,[6] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500(a) (1965), pp. 587-588:

> Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
>
> For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk.
>
> . . .
>
> For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

---

[4] *Robbins v. City of Wichita*, 455, 470, 172 P.3d 1187 (2007) citing Restatement [Second] of Torts § 500, p. 587 [1963-1964].

[5] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 68, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045 (2007) (citing *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

[6] *Wiehe v. Kukal,* 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

"Willful" includes the element of intractableness or the headstrong disposition to act by the rule of contradiction.[7] "Willfulness" entails a higher standard of culpability than "recklessness."[8]

Respondent asserts claimant willfully failed to use a guard or protection and recklessly violated its safety rules by speeding, disabling the rails alarm system and not wearing a seatbelt. Claimant argues he was not speeding, his speed was exaggerated by Mr. Cheek and speeding did not cause his accident. He denies he disabled the alarm system and avers he was wearing his seat belt.

The fact finder must first determine if the injured worker committed the acts that constitute a willful failure to use a guard or protection or recklessly violate his or her employer's safety rule. If the injured worker committed the acts, then the issue becomes whether the injured worker willfully failed to use a guard or protection against an accident and or recklessly violated respondent's safety regulations. If so, did the injured worker's injuries result from his or her willfulness and recklessness. When those principles are applied to the present case, did claimant speed, disable the alarm or not wear his seatbelt? If so, did claimant willfully fail to use a guard or protection or recklessly violate respondent's safety rules, and did his injuries result from his willful or reckless actions?

The rails were raised on the truck and struck the bridge. At the time, the alarm indicating the rails were raised did not sound. No matter what speed claimant was traveling at, he was going to strike the bridge because of the raised rails. However, the issue is not whether speeding caused claimant's accident, but whether claimant willfully violated respondent's safety rules by speeding and speeding caused his injuries. Insufficient evidence was presented by respondent that claimant was speeding, that if he did speed, he did so willfully, or that speeding resulted in claimant's injuries.

Claimant testified the speed limit was 35 miles per hour, and he had stopped at a stoplight and was proceeding when he struck the bridge. He asserts a 20 M.P.H. sign was merely cautionary. This Board Member is uncertain if claimant exceeded the speed limit at the time of the accident. Insufficient evidence was presented that claimant was willfully speeding. Nor was any evidence presented that speeding caused or even increased the severity of claimant's injuries.

Mr. Cheek's estimates of claimant's speed are questionable. He based his opinion on his observation of a previous similar wreck where the driver allegedly traveled at 45 miles per hour and that truck sustained less damage and traveled a shorter distance after

---

[7] *Lira v. Preferred Personnel, Inc.,* No. 1,067,794, 2014 WL 1758045 (Kan. WCAB Apr. 10, 2014).

[8] *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494 (Kan. WCAB June 10, 2013).

the wreck than claimant's truck. Mr. Cheek's assertion that claimant's 45,000-pound truck catapulted 50 yards is dubious.

The alarm was disconnected, but the record contains no evidence on how it became disconnected. If the alarm was disconnected by a person, there is insufficient evidence it was claimant who did so. Mr. Cheek theorized claimant disconnected the alarm because it was annoying, but admitted there was no way to tell that. There is insufficient evidence that claimant disconnected the alarm. There is little, if any, evidence in the record indicating claimant was aware the rails were up when he struck the bridge. Accordingly, claimant did not willfully fail to use a safety guard or recklessly violate respondent's safety rules.

Mr. Cheek's assertion that claimant failed to use his safety belt is conjecture. He testified the steering wheel had scuffs and scrapes made by claimant's clothing and was bent in multiple locations. This Board Member finds claimant's testimony that he was wearing his seat belt was not rebutted and, therefore, claimant did not violate respondent's workplace safety rules.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

1. Respondent did not prove claimant's injuries resulted because he exceeded the speed limit.

2. There is insufficient evidence that claimant disabled the rail alarm on the truck he was driving or was aware the rails were up at the time of the accident.

3. Respondent failed to prove claimant was not wearing his seatbelt at the time of his accident or was aware the rails were raised.

4. Respondent failed to prove claimant willfully failed to use a guard or protection from accident or recklessly violated a workplace safety rule.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated August 4, 2015, is affirmed.

---

[9] K.S.A. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
karennewmann@mcwala.com
jmostrowski53@gmail.com

Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
mhoffmeister@hdwlawfirm.com

Honorable William G. Belden, Administrative Law Judge